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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-988

DAVID RICHARDSON, PATRICIA KING, PATRICK KELLY AND HIRAM SPAIN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PETITIONERS,

versus

J. MEANS McFADDEN, MORRIS D. ROSEN, C. W. F. SPENCER, ROBERT D. SCHUMPERT, DAVID L. FREEMAN AND ALBERT L. JAMES, JR., INDIVIDUALLY AND AS MEMBERS OF THE STATE BOARD OF LAW EXAMINERS; AND FRANCES SMITH, CLERK OF THE SUPREME COURT OF SOUTH CAROLINA, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the Fourth Circuit Court of Appeals sitting *en banc*, the panel of the Fourth Circuit Court of Appeals and the District Court are set out in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

Respondents do not question the Court's jurisdiction to issue a Writ of Certiorari to the Fourth Circuit Court of Appeals in this proceeding; Respondents do contest the jurisdiction of the lower federal courts to decide the issues raised by the Petitioners below. The question of lower court jurisdiction is addressed in the first portion of this Brief (*infra* at 11).

QUESTIONS PRESENTED

I.

Whether the lower federal courts have jurisdiction to review bar examination results in individual cases and to order admission of persons who fail the examination to the bar of a state court?

II.

Whether the lower courts erred in finding that the disparity in passing rates of blacks and whites on the bar examination was not the result of purposeful discrimination, but was instead related to non-racial factors.

III.

Whether the Petitioners Spain and Kelly, having been graded anonymously on the same basis as all other applicants taking the same bar examination, have shown a violation of their Constitutional rights?

STATEMENT OF THE CASE

This action was brought by four black law school graduates (hereinafter called the Applicants or Petitioners) who have repeatedly failed to pass the South Carolina bar examination and who now seek a federal court order that they be licensed to practice law in South Carolina without further examination. They also seek a ruling from this Court that no bar examination may be used by the State. The Respondents (hereinafter called the Law Examiners) are the six members of the South Carolina Board of Law Examiners and the Clerk of the Supreme Court of South Carolina, who serves as secretary to the Board, *ex officio*. The amended complaint alleges four causes of action against the Law Examiners.

(1) that the Law Examiners have intentionally maintained and administered the bar examination for the purpose of excluding black applicants from admission to the bar;

(2) that the intention behind the bar examination is not to determine fitness to practice law, but rather to perpetuate the effects of racial segregation in the formerly dual school system;

(3) that the use of the bar examination is unconstitutional because the examination has not been validated by psychometricians;

(4) that failing applicants are denied due process because there are no standards or mechanisms for review of failing grades assigned to individual examination papers.[1]

---

[1] Allegations (1) and (2) were substantially abandoned by the Applicants on appeal to the Fourth Circuit when they conceded that the Law Examiners do not intentionally discriminate against blacks in grading examination papers. See *infra*, p. 14, n. 3. Allegation (3) is not raised in the petition for certiorari. Allegation (4) has been transmuted into a claim that two of the Applicants, Spain and Kelly, obtained passing scores on the examination and were denied due process by not being certified for admission to the bar.

By way of answer the Law Examiners denied the material allegations of the complaint and also pleaded lack of jurisdiction and their immunity from suit.[2]

Discovery in the case was extensive. During a nine month discovery period the parties amassed eighteen volumes of deposition testimony and approximately one hundred and fifty pages of answers to interrogatories. In addition, counsel for the applicants were allowed to copy approximately five hundred examination papers written for the July 1972 bar examination, all questions on the July 1972 essay examination, all existing model answers and grading sheets for the July 1972 examination, and the computer printouts of examination scores on the February and July 1972 examinations prepared by the National Conference of Bar Examiners (NCBE) in connection with the administration of the Multistate Bar Examination (MBE) in South Carolina.

The case was tried on July 16-26, 1973, before the Honorable Sol Blatt, Jr. The District Court heard testimony from twenty-four witnesses. Over one hundred exhibits (totalling over 2,000 pages) were introduced into evidence. The transcript of trial runs to over one thousand four hundred pages. On October 18, 1973, the District Court entered its order denying relief to the Applicants, but with leave to reinstate their case on the issue of due process review after presenting their claims to the South Carolina Supreme Court. The Applicants appealed the District Court's order on November 15, 1973. On November 16, 1973, the Law Examiners cross-appealed from the District Court's order insofar as it failed to dismiss the entire action with prejudice.

[2] Although the question of immunity is not discussed in this Brief, it has been asserted by the Examiners at every stage of the proceedings below and the Examiners reserve the right to raise the issue should the Petition be granted.

On appeal a three-judge panel of the Fourth Circuit Court of Appeals ruled against the Applicants on each of their contentions except the allegation that two applicants, Spain and Kelly, had been denied certification incorrectly. As to Petitioners Spain and Kelly, the panel concluded that they had been improperly denied certification and ordered that they be certified as having passed the examination.

The Examiners were granted a rehearing *en banc*. Without dissent the *en banc* Court affirmed the panel decision in every respect but one: reversing the panel, it found that the two Applicants had failed to prove a violation of due process or equal protection in the grading of their examinations. Three judges, concurring, were of the opinion that the action should have been dismissed for lack of jurisdiction. Petitioners now seek review of the *en banc* decision in this Court.

STATEMENT OF THE FACTS

In addition to the summary of evidence and argument contained in the Petitioners' Statement of Facts (Pet. 4-13), the Examiners invite this Court's attention to the following facts.

Administration of the South Carolina bar examination. The South Carolina Bar Examination now consists of two parts. The Multistate Bar Examination (MBE), an objective, multiple-choice exam which is constructed by the National Conference of Bar Examiners and machine graded; and a six-part essay examination constructed and graded by the six Examiners, respectively. (A. Ex. 151-152, 244-245). Each applicant receives a randomly assigned examination number from the Clerk of Court on the morning of the first day of the examination. (A. Ex. 138, 149). All applicants are instructed to use only this number on their MBE answer sheets and their essay papers; if an applicant places his

name on any paper, he is treated as not having taken the exam. (A. Ex. 285). The Examiners never see the master list from which the numbers are assigned by the Clerk, and the identity of applicants is not divulged to them either before or after the examination. (A. Ex. 141; 312-313; 532; 469-470; 505-506; 340; 435). Likewise, the Examiners never see any applications or photographs of any applicants. (A. Ex. 140; 312; 532; 469-470; 505; 340; 435). Thus the Examiners do not know, and have no way of knowing, the identity of an applicant, his race, his law school background, or whether he has previously failed the bar exam. (A. Ex. 284; 332; 493).

The four plaintiffs. The Petitioner Richardson attended law school at American University for only three terms. (A. 153, 158); he graduated in the bottom fourth of his class (A. Seal. Ex. 24); prior to that he attended Howard University Law School for two years (A. 158); he transferred from Howard because of disruption and confusion on the law school campus in which he became emotionally involved (A. 127, 154-157); he failed civil procedure in his first year, and also failed his course in partnership and agency; he made D's in contracts, corporations, wills, trusts, future interests, civil procedure (the second time he took it), and legal accounting; he made the lowest possible C grade (70) in torts, constitutional law, and partnership and agency (the second time he took it); he made a low C (72) in his first semester of commercial law[3] (A. Seal. Ex. 23); his

[3] With the exception of legal accounting, all of these subjects are tested on the South Carolina bar examination. Richardson also testified as follows:

> Q. . . . (Were) there any subjects appearing on the bar examination . . . that you . . . did not have in law school?
>
> A. Yes. I did not have a course in insurance. I did not have much preparation in trusts and wills as examined by the Board of Examiners. Therefore, I concentrated in that area . . . and the South Carolina court pleadings. (A. 144-145).

scores on the LSAT were 273, 333 and 276 (A. Seal. Ex. 27); he had either full-time or part-time employment throughout law school (A. 151-154); he was actively engaged in both curricular and non-curricular clinical programs (A. 158-161); and he failed the South Carolina bar examination three times (A. 7).[4]

The Petitioner King, a graduate of North Carolina Central Law School, failed the bar examination once in North Carolina, once in the District of Columbia, and three times in South Carolina. (A. 213-214; 7);[5] she made D's in contracts, criminal law, and real property—all fundamentals tested on the South Carolina bar examination (A. Seal. Ex. 26); and she did not take courses in civil procedure or federal practice in law school (A. Seal. Ex. 26; A. 213).

The Petitioner Spain graduated from Howard Law School, where he received D's in contracts, in federal jurisdiction and procedure, and in legal methods (A. Seal. Ex. 21); he made low C's in corporations (72), insurance (71), family law (71), and professional responsibility (70) (*Id.*); he had a declining grade point average in his last year of law school (A. Seal. Ex. 21-22); he took a number of "pass-fail" courses (*Id.*); he had outside employment while in law

[4] Richardson's bar exam scores were:

	Scores for Each Examiner						*MBE Score*
Feb. 1971	67	67	60	67	76	66	...
June 1971	50	62	68	69	64	69	...
July 1972	64	66	77	63	73	68	68.7

(A. Ex. 27)

[5] King's bar exam scores were:

	Scores for Each Examiner					
June 1968	F	F	F	F	F	F
Feb. 1970	47	59	65	45	51	50
Feb. 1971	65	48	63	65	65	56

(A. Ex. 27)

school (A. 106-110); and his background in trusts, future interests, and evidence was weak. (A. 111; A. Ex. 636-637).[6]

The Petitioner Kelly graduated in the bottom third of his class at Howard Law School; he received D's in contracts, torts, evidence, and one semester of federal tax (A. Seal. Ex. 25); he took several "pass-fail" courses in law school (*Id.*); he scored 284 on the LSAT (A. Seal. Ex. 28) and he failed the bar examination once in the District of Columbia and three times in South Carolina (A. 203, 194-195).[7]

Professor George Neff Stevens, the Project Director of the A.A.L.S. Bar Examination Study Project, testified that the evidence he has seen nationwide indicates that poor performance on the bar examination is related to several non-racial factors. Among these are law school quartile rank, a declining grade point average, and outside work or commitments in the last year of law school. (A. Ex. 670-675). When black applicants taking the South Carolina bar examination were separated into those who attended three predominantly black law schools and those attending other law schools, a substantial disparity in the passing rate among black applicants appeared. Those black applicants attending the predominantly black schools had a passing rate of 44% while those blacks attending the other schools had a passing rate of 82%. (A. 1055-1057). The trial court

[6] Spain did graduate in the top quarter of the 1971 class at Howard, 20th out of 111. Only 32% (36 out of 111) of the 1971 graduating class at Howard passed the bar examination nationwide. (A. Ex. 783). Spain failed the South Carolina bar examination twice. His scores were:

	Scores for Each Examiner						*MBE Score*
June 1971	71	72	66	66	80	68	...
Feb. 1972	70—	62	45	65	57	66	68.7

(A. Ex. 27)

[7] Kelly's scores on the bar exam were:

	Scores for Each Examiner						*MBE Score*
Feb. 1971	69+	70	66	71	78	63½	...
June 1971	69	66	62	69	72	68	...
July 1972	70—	58	70	67	66	65	68.3

(A. Ex. 27)

concluded that the evidence introduced by the Law Examiners demonstrating a correlation between the institution attended and results on the bar examination rebutted a presumption of discrimination raised by evidence of disparate racial impact. (Pet. App. at 49a).

The history of admission to the South Carolina Bar. The Petitioners assert that the South Carolina Bar has traditionally discriminated against blacks. (Pet. at 6). This contention has been rejected by each of the Courts below.

The bar examination has been used in South Carolina since 1886 (A. Ex. 727). No laws or rules of court have ever prohibited black citizens from practicing law in South Carolina or imposed different standards of admission based on race. According to the 1970 United States census figures, South Carolina has the highest proportion of black lawyers at its practicing bar of any state in the nation. (A. Ex. 720). The District Court found that there was no intention to exclude black applicants from the practice of law in South Carolina by use of the bar examination (Pet. App. at 46a). This finding was never challenged by the Petitioners on appeal or on rehearing *en banc*.

Diploma privilege was once a method of admission to the practice of law in South Carolina. The privilege was available only to graduates of the University of South Carolina School of Law. In 1947 the diploma was abolished, effective after June 1950. As early as 1921, the American Bar Association had gone on record as opposing admission to practice through the method of diploma privilege. (A. Ex. 731). As early as 1940 the South Carolina Bar Association was on record as adopting the ABA position on the diploma privilege. (A. Ex. 734). A survey of admission to the bar in various jurisdictions of the United States shows that in 1915 nineteen jurisdictions had diploma privilege, while in 1972 only three jurisdictions retained diploma privilege. (A.

Ex. 728). The abolition of the diploma privilege in South Carolina was in keeping with the national trend toward abolition of the diploma privilege.

A two-year period of supervised reading and study of law in the law office of a practicing member of the South Carolina bar was once accepted in lieu of a law school degree as a prerequisite to taking the bar exam in South Carolina. Reading law was abolished in 1957. As early as 1921 the American Bar Association was on record as opposing reading in lieu of law school education. (A. Ex. 731). As early as 1940 the South Carolina Bar Association was on record as adopting the ABA position on the reading privilege. (A. Ex. 734). In 1915 fifty-one jurisdictions permitted reading; in 1972 only ten jurisdictions still permitted reading (A. Ex. 728). The abolition of reading in South Carolina was in line with the national trend toward abolition of law office reading and study as a method of satisfying the educational prerequisites for admission to the practice of law.

By order of the South Carolina Supreme Court, effective April 1972, admission of attorneys from other jurisdictions by motion was abolished. The evidence indicates that this was done in order to curb an increasing flow of semi-retired lawyers into the state not sufficiently skilled in the principles and practice of law in South Carolina. (A. Ex. 159). The elimination of admission by motion in South Carolina is also in keeping with the trend in other jurisdictions. In 1915 forty-six jurisdictions admitted attorneys from other jurisdictions by motion. In 1972 thirty-seven jurisdictions admitted by motion. (A. Ex. 728).

ARGUMENT

I.

The lower federal courts have no jurisdiction to review bar examination results in individual cases or to order that failing applicants be admitted to practice in the state courts.

Throughout this litigation, the Law Examiners have contended that inferior federal courts lack jurisdiction to determine the qualifications of individual applicants to the state bar. The majority of the Fourth Circuit Court of Appeals, sitting *en banc,* found it unnecessary to resolve this question and ruled in favor of the Examiners on other grounds.[1] Lack of jurisdiction over the subject matter provides a reason in itself for denying the Petition for Writ of Certiorari.

This Court, in *In re Lockwood,* 154 U. S. 116 (1894) held that:

> . . . the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers not transferred for its protection to the Federal government.

Id., at 117 (citing *Bradwell v. The State,* 16 Wall. (83 U. S.) 130 (1872).

It is the responsibility of the state courts to assure that those who seek to offer their legal services to the public and who seek to represent the public in litigation are in fact possessed of the necessary legal skills to do so effectively. The right and obligation to determine whether those who practice before them are persons of high character and demonstrated legal ability and to restrict practice only to persons possessing such qualifications is the exclusive province of the courts before whom the individual seeks to practice. The judgment of one system of courts concerning

[1] Three judges on the *en banc* panel agreed in a strong concurring opinion that there was no jurisdiction.

the qualifications of particular applicants is its own and is not binding upon any other courts.

> The two judicial systems of courts, the state judicature and the federal judiciary, have autonomous control over the conduct of their officers among whom, in the present context, lawyers are included.

Theard v. United States, 354 U. S. 278 (1957); *Selling v. Radford,* 243 U. S. 46 (1917).

The fact that there is no subject matter jurisdiction in the federal court to determine qualifications of those seeking admission to the state bar does not mean that such decisions escape review. The judgments of state courts in such cases are reviewable in this Court on writ of certiorari in those instances in which a federal question is raised by the proceedings below. *Schware v. Board of Law Examiners,* 353 U. S. 232 (1956); *Konigsberg v. State Bar of California,* 353 U. S. 252, reh. denied, 354 U. S. 927 (1956). However, the mere existence of a federal question raised by the state court proceedings does not confer jurisdiction on the *lower* federal courts.

The courts below also lacked jurisdiction under the familiar principle that lower federal courts cannot sit in appellate review over the decision of the state courts. The determination by a court of the qualifications of a particular person to practice law at its bar is a judicial decision and not an administrative act. *Atchison, Topeka & Santa Fe Ry. Co. v. Jackson,* 235 F. 2d 390 (10th Cir. 1956).[2] As such, the decision constitutes a judicial determination by the state court which cannot be reviewed by a federal district court. *Rooker v. Fidelity Trust Co.,* 263 U. S. 413 (1923); *Feldman v. State Board of Law Examiners,* 438 F. 2d 699 (8th Cir. 1971); *MacKay v. Nesbett,* 412 F. 2d 864 (9th Cir. 1969); *Ginger v. Circuit Court for Wayne County,* 372 F. 2d 621 (6th Cir. 1967); *Clark v. State of Washington,* 366 F 2d 678 (9th Cir. 1966); *Gately v. Sutton,* 310 F. 2d 107 (10th Cir. 1962). The decisions of the State Supreme Courts are reviewable only in this Court by way of petition for certiorari and not in the federal district court.

[2] That the State determination of the qualifications of a candidate for admission constitutes a judicial act is demonstrated by the fact that this Court may review such a determination by way of a writ of certiorari. The jurisdiction of this Court would not extend to review of an administrative determination.

This principle has been recognized in cases seeking to review state court orders of disbarment, e.g. *MacKay v. Nesbett, supra; Jones v. Hulse,* 391 F. 2d 198 (8th Cir. 1968); and also in cases dealing with admission to the state bar. *Doe v. Pringle,* 550 F. 2d 596 (10th Cir. 1976); *Murry v. Supreme Court of Arizona,* No. 72-2101 F. 2d (9th Cir. 1973); *Feldman v. State Board of Law Examiners, supra; Arvelo v. Supreme Court of Puerto Rico,* 382 F. Supp. 510 (D.P.R. 1974). To hold otherwise would be to vest in the lower federal courts an appellate jurisdiction over the state judiciary granted to them neither by the Constitution nor by act of Congress.

The stated principle is not in conflict with those cases in which lower federal courts have entertained challenges to the constitutionality of general rules governing admission to the bar. See e.g. *Lipman v. Van Zant,* 329 F. Supp. 391 (N. D. Miss 1971) (3 judge court); *Law Students Civil Rights Research Council v. Wadmond,* 299 F. Supp. 117 (S.D.N.Y. 1969) (3 judge court). Such suits seek, in effect, to enjoin enforcement of a state law as unconstitutional on its face. They do not seek review by the district court of the judgments of the highest state court in individual cases.

II.

The lower courts' finding that the bar examination has no racially discriminatory purpose is supported by overwhelming evidence in the record establishing that its purpose is to test legal knowledge and that the disparity in the passing rates of blacks and whites is explained by racially neutral factors.

This Court held in *Washington v. Davis,* 426 U. S. 229 (1976), that in actions alleging racial discrimination brought under the Fourteenth Amendment proof of discriminatory racial purpose is necessary in order to establish a violation of the Equal Protection Clause and that a disproportionate impact alone is insufficient. In *Davis,* this court stated:

> Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.

Id. at 246.

In this case, the District Court, the panel of the Fourth Circuit, and the full Court *en banc* found that the examination was facially neutral and rationally connected with the legitimate State purpose of determining the fitness of applicants to practice law. In the Court of Appeals the Petitioners abandoned their claim that there is purposeful discrimination against blacks in grading the bar examination.[3] In-

[3] In their brief they stated:

> In the instant case, the district court found as a fact that there was no intentional racial discrimination in the assigning of individual test scores by the individual bar examiners. Plaintiffs do not here challenge that finding.

Brief of Appellants, Cross-Appellees at 10

stead they now seek a ruling by this Court that no bar examination may be used *at all* by the State of South Carolina,[4] based on their contention—unsupported by the evidence at trial and rejected by the Courts below—that the state has discriminated against black applicants in the past and presently requires the bar examination for the purpose of eliminating blacks. In fact, the District Court found that the disparity in passing rates for blacks and whites raised a "presumption of discrimination" (Pet. App. at 49a), then considered evidence introduced by the Examiners to show racially neutral reasons for the disparity and concluded that no discriminatory purpose existed. Thus, Petitioners' claim that the lower court applied an erroneous legal standard (Pet. at 16) is without foundation.

The Examiners brought forward overwhelming evidence at trial establishing to the satisfaction of the Courts below that there was no history of discrimination against blacks in admission to the South Carolina bar and explained the various actions taken by the South Carolina Supreme Court on grounds other than race. The Applicants simply failed to prove their case. *Village of Arlington Heights v. Metro Housing Development,* 429 U. S. 252 (1977).

The Courts below found as a fact that the examination was administered anonymously. South Carolina has never required any different qualifications for black and white applicants. The Law Examiners cited neutral reasons for three changes in the requirements for admission to the State Bar over a thirty year period.[5] The Petitioners have

[4] Pet. at 2, Question 1. This Question was neither briefed nor argued in the Courts below.

[5] Each contention argued by Petitioners in their Statement of Facts (Pet. at 6-8) either was considered by the Courts below before finding that no discriminatory purpose existed or did not appear in the record at all. For example, the contention that the diploma privilege was extended for the benefit of an all-white private institution (Pet. at 6, n. 1) appears nowhere in the record.

never contested figures of the 1970 census showing that South Carolina has the highest proportion of black attorneys of any state in the nation. Nine judges below, the District Judge and the eight members[6] of the Court of Appeals, have examined the extensive record developed in this case and determined that no deliberate state scheme of excluding blacks from the practice of law existed in South Carolina.

III.

Petitioners Kelly and Spain received no different treatment from any other applicant examined at the same time, and therefore cannot claim violation of their rights to equal protection or due process.

Two of the Applicants in this case claim that they passed the bar examination the first time they took it, but that the Law Examiners failed to certify them for admission because of errors in scoring their examination results. Specifically, Spain claims that he obtained an average score of 70.5 on the examination in June 1971 and Kelly claims that he obtained a 69.6 (which under the practice of the Examiners would round up to 70) in February 1971. The Law Examiners do not dispute that Spain and Kelly obtained these scores in 1971. However, the Examiners *do* dispute that Spain and Kelly met the standard for certification that was applied in February and June 1971.

Under oath and in response to repeated and vigorous questioning by the Applicants' attorneys the individual Examiners consistently testified that at the time Spain and Kelly first took the examination, a person could obtain an average score of 70 or better and still fail the examination if he failed three or more examiners.[7] In cases where a person failed three examiners and passed three, the person could either pass or fail the examination depending upon the particular configuration of scores that he obtained[8] and upon a discussion of the quality of the examination papers based on notes which the examiners had made while grading the papers.

The main thrust of the Applicants' argument is that the Law Examiners did not apply their own standards consistently, thus violating the rights of Spain and Kelly to equal protection and due process. The Applicants created the supposed "inconsistency" by combing the record of some 828 individual examinations during eight administrations of the bar examination over a four year period. Based on a handful of cases spread over different years and different examinations,[9] Spain and Kelly alleged that they were treated differently from other applicants who took the examination. This "inconsistency" of treatment disappears if the results of Spain and Kelly are compared to others who took the examination at the same time they did.

---

[6] Senior Circuit Judge Boreman sat by designation on the panel and was, therefore, entitled to sit on the *en banc* Court of Appeals.

[7] A. 235-236, 253-255, 307-309, 44, 881-882, 820-823.

[8] A. 253-255, 449-450, 457-458, 84-88, 12.

[9] Uncontradicted evidence in the record establishes that during the period from 1969 through 1972 the Law Examiners used three different methods for reaching the pass-fail determination. This fact makes year-to-year comparisons of the type suggested by applicants even more inaccurate. The three methods may be summarized as follows:

(1) Prior to 1970 the Examiners reviewed only the number of individual examiners an applicant passed and any notes or comments about the quality of his papers. A numerical average for the six examiners was not computed. (A. Ex. 60).

(2) From 1970 through 1971 the Examiners computed a numerical average based on scores obtained from the six individual examiners. An average score of 70 or better was generally passing, but in borderline cases (69-71) the Examiners would review each applicant's results based on the number of examiners passed, the configuration of scores, and notes or comments made by individual examiners on the quality of the applicant's papers.

(3) In 1972 the Examiners adopted the MBE for use as part of the South Carolina Bar Examination. This led to a change in the method by which the numerical score was computed. The details of this method, which employs computerized weighting and averaging, are explained in the record. (A. 803-807). Once the composite numerical score for the MBE and essay portions of the exam was obtained, the Examiners then reviewed borderline cases using the method described above from 1970-71. (A. 809-810.)

In June 1971 Spain was treated no differently than other examinees who failed three or more of the law examiners.[10]

June 1971

Applicant No.	*Average*	*No. Failed*	*Pass or Fail*
# 98	71.8	2	P
#160	71.8	3	F
# 53	71.5	2	P
# 18	71.4	2	P
# 69	71.0	2	P
#164	71.0	1	P
# 68	70.9	1	P
#114	70.8	1	P
#120	70.8	1	P
# 49	70.7	2	P
# 51 (Plaintiff Spain)	70.5	3	F
#116	70.5	4	F
# 21	70.3	2	P
# 61	70.2	3	F
#139	70.0	2	P

(AX. 48-52)

[10] Of the three examinees (51, 61 and 160) who failed three of the law examiners and consequently were not certified, two are white and one (Spain) is black. (A. Ex. 84 and 87).

In February 1971 Kelly likewise was treated the same as other examinees who failed three of the law examiners.[11]

Applicant No.	*Average*	*No. Failed*	*Pass or Fail*
# 35	71.5	1	P
# 34	71.5	2	P
# 18	70.8	1	P
# 19	70.2	3	F
# 12	69.7	4	F
# 4 (Plaintiff Kelly)	69.6	3	F
# 10	69.3	2	P
# 29	67.2	3	F
# 6	67.2	5	F
# 2	66.2	6	F

(AX. 53-54)

While these borderline cases involve small differences in scores, the fact remains that the Law Examiners did not deviate from their own standards in the cases of Spain and Kelly. No other system of making the pass-fail distinction, including the ones suggested by the Applicants' own expert witnesses, avoids close results in borderline cases. Additionally it should be noted that Spain and Kelly both failed to pass upon re-examination:

Kelly	*Individual Examiners*						*MBE*			*Final*
Scores	*1*	*2*	*3*	*4*	*5*	*6*	*R*	*I*	*II*	
Feb. 1971	69+	70	66	71	78	63½	—	—	—	F
June 1971	69	66	62	60	72	68	—	—	—	F
July 1972	70–	58	70	67	66	65	*111	68	68	67
Spain										
Scores										
June 1971	71	72	66	66	80	68	—	—	—	F
Feb. 1972	70–	62	45	65	67	66	**121	70	69	65

*118 = lowest passing MBE score.
**124 = lowest passing MBE score (AX 27).

[11] Of the three examinees (4, 19 and 29) who failed three of the law examiners and consequently were not certified, two are black (one the Petitioner Kelly) and the other is white. No. 19 is white, Nos. 4 and 29 are black. (A. 53-54).

The Applicants were treated in no different fashion than others taking the same bar examination at the same time. Having received equal treatment they have no equal protection or due process violation to allege. The issues involved are factual and they were resolved correctly by the Courts below. As the claims of Spain and Kelly involve no substantial questions of law and review by this Court of a factual dispute would have limited precedential value, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondents pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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